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Civil Rights - Public Employer May Voluntarily Adopt an Affirmative Action Program to Remedy Judicially Determined Racial Discrimination

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Recent Developments

CIVIL RIGHTS—PUBLIC EMPLOYER MAY VOLUNTARILY ADOPT AN AFFIRMATIVE ACTION PROGRAM TO REMEDY JUDICIALLY DETERMINED RACIAL DISCRIMINATION.

Chmill v. City of Pittsburgh (Pa. 1980)

In 1974, the United States District Court for the Western District of Pennsylvania found in *Commonwealth v. Glickman* [1] that hiring procedures used by the Pittsburgh Bureau of Fire and the Pittsburgh Civil Service Commission (Commission) had discriminated against blacks in violation of federal law.[2] As part of its remedial order, the district court directed the Civil Service Commission to either show the validity of its testing procedures or formulate a new job-related testing procedure.[3] As a result of the federal court's decision, the Commission abandoned its prior testing procedure and, beginning in June 1974, administered new hiring examinations.[4] Although minorities passed an examination subsequently administered by the Commission in August 1975 in roughly the same percentages as whites, minorities did not place in substantial numbers at the top of the list.[5] Thus in March 1976, when the city requested the Commission to certify twenty candidates for new openings as firefighters,[6] only three of those among the first twenty were minorities.[7] Mindful of its obligation to remedy proven racial discrimination, and in light of the failure of its revised testing program to remedy that discrimination, the Commission voted unanimously to depart from the "top down" hiring requirements of the Pennsylvania Firemen's Civil

1. 370 F. Supp. 724 (W.D. Pa. 1974).

2. *Id.* at 730-31.

3. *Id.* at 737-38.

4. Chmill v. City of Pittsburgh, 488 Pa. 470, 476, 412 A.2d 860, 864 (1980).

5. *Id.* at 477, 412 A.2d at 864.

6. *Id.* The Second Class Cities Firemen's Civil Service Act requires hiring be accomplished from the top down on a competitive list. PA. STAT. ANN. tit. 53, §§ 23491-98 (Purdon 1957 & Supp. 1979). Section 23493.1(a) of the Act provides that:

> Both original appointments and promotions to any position in the competitive class in any bureau of fire in any city of the second class shall be made only from the top of the competitive list: Provided, however, That the appointing officer may pass over the person on the top of the competitive list for just cause in writing. Any person so passed over shall, upon written request, be granted a public hearing before the Civil Service Commission.

Id. § 23493.1(a).

7. 488 Pa. at 477, 412 A.2d at 864.

Service Act and to certify ten white applicants and ten minority applicants.[8]

Claiming that they would have been hired but for the Commission's decision to certify equal numbers of whites and minorities, white applicants[9] for jobs as firefighters challenged the use of race-conscious hiring procedures in a hearing before the Commission, but were denied relief.[10] The Common Pleas Court of Allegheny County denied a statutory appeal[11] and dismissed a request for injunctive relief.[12] The Commonwealth Court reversed,[13] ruling that the Commission's voluntary action offended Title VII of the Civil Rights Act of 1964 (Title VII),[14] the equal protection guarantee of the fourteenth amendment,[15] the Pennsylvania Human Relations Act,[16] and state statutes regulating the civil services.[17] On appeal, the Pennsylvania Supreme Court reversed the order of the Commonwealth Court, and reinstated the order of the trial court,[18] *holding* that a public employer may voluntarily adopt an affirmative action program to remedy judicially determined racial discrimination.[19] *Chmill v. City of Pittsburgh,* 488 Pa. 470, 412 A.2d 860 (1980).

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8. *Id.* at 477-78, 412 A.2d at 865.

9. *Id.* at 478, 412 A.2d at 865. The plaintiffs were ranked between 15 and 20 on a single test list derived from a 1975 examination. *Id.* at 478, 412 A.2d at 864.

10. *Id.* at 478, 412 A.2d at 865. The basis of the plaintiffs' appeal to the Commission was the Second Class Cities Firemen's Civil Service Act which provides in pertinent part that "appointments . . . shall be made only from the top of the competitive list . . . . Any person . . . passed over shall . . . be granted a public hearing before the Civil Service Commission." PA. STAT. ANN. tit. 53, § 23493.1 (Purdon 1957 & Supp. 1979). For the complete text of § 23493.1, *see* note 6 *supra.*

11. 488 Pa. at 478-79, 412 A.2d at 865. The basis of the plaintiffs' appeal to the Common Pleas Court was PA. STAT. ANN. tit. 53, § 23497.3 (Purdon 1957 & Supp. 1979), which provides in pertinent part that "[a]ny person aggrieved by the findings of the commission shall have the right to appeal to the court of common pleas of the county." *Id.*

12. 488 Pa. at 478-79, 412 A.2d at 865.

13. Chmill v. City of Pittsburgh, 31 Pa. Commw. Ct. 98, 375 A.2d 841 (1977), *rev'd,* 488 Pa. 470, 412 A.2d 860 (1980). Two judges on the Commonwealth Court dissented. 31 Pa. Commw. Ct. at 113-14, 375 A.2d at 848-49 (Wilkinson, J., dissenting).

14. *Id.* at 105-07, 375 A.2d at 845-46. *See* 42 U.S.C. § 2000e (1976).

15. 31 Pa. Commw. Ct. at 107-08, 375 A.2d at 846. *See* U.S. CONST. amend. XIV.

16. 31 Pa. Commw. Ct. at 103-05, 375 A.2d at 844-45. *See* PA. STAT. ANN. tit. 43, § 955 (Purdon 1964 & Supp. 1979).

17. 31 Pa. Commw. Ct. at 102, 375 A.2d at 844. *See* PA. STAT. ANN. tit. 53, §§ 23491-98 (Purdon 1957 & Supp. 1979).

18. 488 Pa. at 474, 412 A.2d at 862.

19. *Id.* Specifically, the Supreme Court held that: (1) the Commission's institution of temporary remedial race-conscious hiring was not prohibited by Title VII of the Civil Rights Act of 1964; (2) the Pennsylvania Human Relations Act does not bar race-conscious voluntary remedial action; (3) the Second Class Cities Fireman's Civil Service Act did not prohibit voluntary remedial

In *Regents of the University of California v. Bakke*,[20] five justices of the United States Supreme Court[21] addressed equal protection questions[22] raised by a governmental entity's adoption of a race-conscious affirmative action plan.[23] These five justices agreed that the equal protection clause of the fourteenth amendment does not, in all circumstances, prohibit a governmental entity from utilizing racial classifications.[24] Following the *Bakke* decision that affirmative action plans do

action in certifying ten white and ten minority applicants for jobs as firefighters; and (4) the Commission's institution of temporary race-conscious hiring in response to an existing federal judicial mandate to correct found racial discrimination was not prohibited by the equal protection clause of the fourteenth amendment. *Id.* at 470-71, 412 A.2d at 861.

20. 438 U.S. 265 (1978).

21. Justice Powell announced the decision of the Court. *Id.* at 265. Justices Brennan, Marshall, White and Blackmun [hereinafter referred to as the Brennan group] concurred with Justice Powell in upholding the permissibility of considering race in university admissions decisions. *Id.* at 325.

22. *See* U.S. CONST. amend. XIV, § 1, which reads in pertinent part: "[n]or shall any State deprive any person of life, liberty, or property, without due process of the law; nor deny to any person within the jurisdiction the equal protection of the laws." *Id.*

23. 438 U.S. at 355-56. *Bakke* represented the first time the Supreme Court decided a "reverse discrimination" case on the merits. Note, *Equal Protection*, 92 HARV. L. REV. 131, 131 n.2 (1978). The Court had previously been presented with this issue, but dismissed the case as moot. DeFunis v. Odegaard, 416 U.S. 312, 319-20 (1974). The *Bakke* case involved a challenge to a special admissions program established by the University of California at Davis Medical School. 438 U.S. at 272-75. The program reserved 16 out of 100 places in the entering medical school class for qualified disadvantaged minority students. *Id.* A non-minority applicant who had been rejected by the medical school attacked the race-conscious special admissions program as violative of both the general anti-discrimination provisions of Title VI of the federal civil rights act and the equal protection clause of the fourteenth amendment. *Id.* at 276-77. *See* 42 U.S.C. §§ 2000d-2000d-4 (1976).

Justices Stevens, Stewart, and Rehnquist, joined by Chief Justice Burger [hereinafter referred to as the Stevens group], found it unnecessary to reach the constitutional issue because they concluded that, without regard to constitutional demands, Title VI should be interpreted to bar the medical school from adopting the race-conscious affirmative action program at issue in that case. 438 U.S. at 416-21 (Stevens, J., concurring in part and dissenting in part). A majority, however, rejected the notion that, in the context of affirmative action plans, Title VI should be interpreted as more restrictive than the equal protection clause. *See id.* at 328 (Brennan, J., concurring in part and dissenting in part); *id.* at 287. Thus, five Justices concluded that, "Title VI prohibits only those uses of racial criteria that would violate the Fourteenth Amendment . . . ." *Id.* at 328 (Brennan, J., concurring in part and dissenting in part). *See id.* at 287. In light of this conclusion, these Justices found it necessary to address and resolve the equal protection issue. *Id.* at 355-79 (Brennan, J., concurring in part and dissenting in part); *id.* at 287-320.

24. 438 U.S. at 355-56 (Brennan, J., concurring in part and dissenting in part); *id.* at 305-06. The coalition split, however, on the question of the nature of the state interest necessary to support the adoption of a race-conscious remedial measure. *Id.* at 307-10; *id.* at 362-69 (Brennan, J., concurring in part and dissenting in part). Reviewing the medical school's justifications for the program, the Brennan group concluded that the objective of remedying the effects of "general societal discrimination" was sufficiently important to justify the adoption of the school's numerical racial ratio program. *Id.* at 369 (Bren-

not, per se, deny equal protection, the Supreme Court in *United Steelworkers v. Weber*,[25] was presented with a Title VII challenge to an affirmative action craft training program [26] established pursuant to an employer-union collective bargaining agreement.[27] Title VII was enacted to eliminate employment discrimination on the basis of race, sex, or national origin.[28] Courts are authorized under Title VII to enjoin employers [29] from engaging in discriminatory practices and to order ap-

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nan, J., concurring in part and dissenting in part). Justice Powell, however, while rejecting the amelioration of societal discrimination as a justification, concluded that the medical school's interest in obtaining a diverse student body was sufficient to justify a race-conscious admissions program. *Id.* at 310-12. He therefore joined the Brennan group in overturning the portion of the trial court judgment which totally barred the medical school from considering race in the admissions process. *Id.* at 320. At the same time, because Justice Powell found that the medical school had not demonstrated that its numerical racial ratio program actually furthered the school's interest in obtaining a diverse student body, he joined with the Stevens group in invalidating the specific special admissions program at issue in that case. *Id.* at 315-20.

25. 443 U.S. 193 (1979). For thorough analysis of *Weber, see* Powers *Implications of Weber—"A Net Beneath"*, 5 EMPLOYEE REL. L.J. 315 (1980); Note, *Civil Rights—Employment Discrimination—Employer May Establish Voluntary Affirmative Action Program Within Area of Discretion Granted by Title VII*, 25 VILL. L. REV. 141 (1979).

26. 443 U.S. at 197. In order to alleviate racial imbalances in its craft work force, Kaiser Aluminum instituted a plan to reserve for black employees 50% of the openings in its in-plant craft training programs until the percentage of black craftworkers approximated the percentage of blacks in the local labor force. *Id.* at 198.

27. *Id.* at 198. The suit was filed by white employees with more seniority who were excluded from the program because of the 50% requirement. *Id.* at 199.

28. HOUSE COMMITTEE ON JUDICIARY, H.R. REP. No. 914, 88th Cong., 1st Sess. (1963), *reprinted in* 1 EEOC LEGISLATIVE HISTORY OF TITLES VII & XI OF THE CIVIL RIGHTS ACT OF 1964 at 2018 (1968) [hereinafter cited as LEGISLATIVE HISTORY OF 1964]. The legislative history of Title VII indicates that its purpose was "to eliminate, through utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion or national origin." 1 LEGISLATIVE HISTORY OF 1964, *supra*, at 2026. 42 U.S.C. § 2000e provides: "It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." *Id.* § 2000e-2(a)(1).

29. 42 U.S.C. § 2000e-5(g) (1976). While originally applying only to private employers, Title VII was amended in 1972 to extend coverage to public employees as well. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103. In 1977, the United States Supreme Court, in Dothard v. Rawlinson, 433 U.S. 321 (1977), specifically recognized that the legislative history of the 1972 amendment extending Title VII to public employees evidenced an intent that "the same principles be applied to government and private employers alike." 433 U.S. at 332 n.14. Every federal court of appeals that has considered the issue has concluded that the same prerequisites of Title VII liability apply to both private and public employer. *See, e.g.*, Scott v. City of Anniston, 597 F.2d 897, 899-900 (5th Cir. 1979), *cert. denied*, 446 U.S. 917 (1980); Blake v. City of Los Angeles, 595 F.2d 1367, 1372-74 (9th Cir. 1979); United States v. City of Chicago, 573 F.2d 416, 420-24 (7th Cir. 1978); Fire-

propriate equitable relief, including affirmative action,[30] and the courts of appeals have consistently upheld race-conscious hiring as a remedy for violation of Title VII.[31] It has been held to be reversible error for a district court to withhold quota relief when other forms of relief failed to eliminate racially discriminatory practices or effects.[32] Additionally, federal courts, including the Third Circuit, have upheld the validity of race-conscious hiring programs incorporated in consent decrees between parties.[33]

The *Weber* court acknowledged that, although a literal construction of the anti-discrimination section of Title VII might preclude all race-conscious remedial programs,[34] it would be inappropriate to adopt such a construction.[35] Accordingly, the Court held that Title VII's prohibition against racial discrimination does not compel a "color blind" approach to all employment remedies.[36] While the *Weber* court did not "define in detail the line of demarcation between permissible and impermissible affirmative action plans," [37] the possibility that some affirmative action plans may be invalid under Title VII was acknowledged.[38] In holding the affirmative action plan at issue in *Weber* to be permissible,[39] the Court looked to three elements: 1) the plan's pur-

fighters Inst. v. City of St. Louis, 549 F.2d 506, 510 (8th Cir.), *cert. denied,* 434 U.S. 819 (1977).

30. 42 U.S.C. § 2000e-5(g) (1976). The statute provides:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.

Id.

31. *See, e.g.,* United States v. City of Chicago, 549 F.2d 415, 436-37 (7th Cir. 1977), *cert. denied sub nom.* Isakson v. United States, 436 U.S. 932 (1978); United States v. Local 38, IBEW, 428 F.2d 144 (6th Cir.), *cert. denied,* 400 U.S. 943 (1970).

32. Morrow v. Crisler, 491 F.2d 1053 (5th Cir.) (en banc), *cert. denied,* 419 U.S. 891 (1974).

33. *See, e.g.,* E.E.O.C. v. American Tel. & Tel. Co., 556 F.2d 167 (3d Cir. 1977), *cert. denied,* 438 U.S. 915 (1978).

34. 443 U.S. at 202.

35. 443 U.S. at 202. After examining the legislative history of the Civil Rights Act and reviewing the historical context in which the act arose, the Court concluded that "an interpretation of the sections [which forbids] all race-conscious affirmative action would 'bring about an end completely at variance with the purpose of the statute' and must be rejected." *Id., quoting* United States v. Public Util. Comm'n, 345 U.S. 295, 315 (1953).

36. 443 U.S. at 208.

37. *Id.*

38. *Id.* at 208-09.

39. *Id.* at 208.

pose; [40] 2) its effect on the interests of non-minority employees; [41] and 3) its duration.[42]

In the wake of *Bakke* and *Weber,* one federal court of appeals [43] and two state supreme courts [44] have validated voluntary governmental affirmative action programs which utilized race-conscious hiring goals or ratios.[45] In *Detroit Police Officers' Association v. Young,*[46] an affirmative action plan voluntarily adopted by the Detroit Police Department required that fifty percent of all promotions go to minorities.[47] The Sixth Circuit held that the promotion program established by the police department was reasonable and did not violate Title VII,[48] but remanded the case for further consideration of the constitutional issue.[49] In

40. *Id.* The *Weber* Court observed that "[t]he purposes of the plan mirror those of the statute. Both were designed to break down old patterns of racial segregation and hierarchy. Both were structured to 'open employment opportunities for Negroes in occupations which have been traditionally closed to them.'" *Id., quoting* 110 CONG. REC. 6548 (1964) (remarks of Sen. Humphrey).

41. *Id.* The majority noted that:

> The plan does not unnecessarily trammel the interests of white employees. The plan does not require the discharge of white workers and their replacement with new black hirees . . . . Nor does the plan create an absolute bar to the advancement of white employees; half of those trained in the program will be white.

Id. (citation omitted).

42. *Id.* at 208-09. The Court stated:

> [T]he plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance. Preferential selection of craft trainees will end as soon as the percentage of black skilled craftworkers . . . approximates the percentage of blacks in the local labor force.

Id.

43. Detroit Police Officers' Assoc. v. Young, 608 F.2d 671, 697-98 (6th Cir. 1979), *petition for cert. filed,* 48 U.S.L.W. 3466 (Jan. 10, 1980) (No. 79-1080).

44. Price v. Civil Serv. Comm'n, — Cal. 3d —, —, 161 Cal. Rptr. 475, 493, 604 P.2d 1365, 1383 (1980); Maehren v. City of Seattle, — Wash. 2d —, —, 599 P.2d 1255, 1270 (1979), *petition for cert. filed,* 48 U.S.L.W. 3453 (Jan. 5, 1980) (No. 79-1061).

45. While *Weber* involved private employment and concerned the scope of a private employer's discretion under Title VII, these cases involve Title VII challenges to public employment affirmative action programs. For a discussion of the application of Title VII to public employment, *see* note 29 *supra.*

46. 608 F.2d 671 (6th Cir. 1979), *petition for cert. filed,* 48 U.S.L.W. 3466 (Jan. 10, 1980) (No. 79-1080).

47. 608 F.2d at 681. In *Young,* the plaintiffs were an association of police officers and a number of white Detroit policemen who were passed over for promotion to the rank of sergeant when black officers with lower numerical standings on the eligibility list received promotions. *Id.* at 671. They sued to enjoin the city police department from continuing operation of the voluntarily initiated affirmative action plan that had been adopted. *Id.*

48. *Id.* at 696.

49. *Id.* at 671.

Maehren v. City of Seattle,[50] the City of Seattle had voluntarily adopted an affirmative action program whereby, in order to achieve ratios of minority, female or handicapped workers in all city classifications equal to their ratios in the community, job candidates could be selected in other than the normal order.[51] The Washington Supreme Court held, *inter alia*, that Title VII permitted use of voluntary affirmative action programs,[52] and that selective certification procedures did not violate the equal protection clause of the United States or Washington constitutions.[53] In *Price v. Civil Service Commission*,[54] the Sacramento County, California district attorney challenged an order by the county civil service commission requiring that, in order to correct the underrepresentation of minorities in the district attorney's office, which the Commission found to have resulted from unintentional discriminatory hiring practices, at least one minority be hired for every two non-minority persons.[55] The Supreme Court of California held that neither the pertinent federal or state anti-discrimination statutes nor the Constitutional equal protection guarantee could be interpreted to prohibit a government employer from voluntarily implementing a reasonable race-conscious hiring program to remedy the effects of the employer's own past discriminatory employment practices.[56]

The Pennsylvania Human Relations Act (Act)[57] was enacted in 1955 for the purpose of remedying discrimination against those historically subordinated.[58] The Act makes it an "unlawful discriminatory practice" for "any employer because of race . . . to refuse to hire or

50. — Wash. 2d —, 599 P.2d 1255 (1979), *petition for cert. filed*, 48 U.S.L.W. 3453 (Jan. 5, 1980) (No. 79-1061). In *Maehren*, employees of the city fire department brought an action challenging the affirmative action program used by the fire department and city in hiring and promotion of personnel. — Wash. 2d at —, 599 P.2d at 1255.

51. — Wash. 2d at —, 599 P.2d at 1260. The affirmative action plan in *Maehren* was adopted without the predicate of judicially determined discrimination. *Id.* However, the trial court in *Maehren* subsequently found that "the City's past employees selection processes had discriminated against minority applicants, the effects of which were continuing and that such discrimination affected hiring and promotion of uniform personnel within the Seattle Fire Department." *Id.* at —, 599 P.2d at 1262-63.

52. *Id.* at —, 599 P.2d at 1261.

53. *Id.* at —, 599 P.2d at 1262-64.

54. — Cal. 3d —, 161 Cal. Rptr. 475, 604 P.2d 1365 (1980).

55. *Id.* at —, 161 Cal. Rptr. at 478-80, 604 P.2d at 1370. The Superior Court of Sacramento County entered judgment in favor of the district attorney and the civil service commission appealed. *Id.* at —, 161 Cal. Rptr. at 475, 604 P.2d at 1365. The Supreme Court of California reversed and remanded. *Id.*

56. *Id.* at —, 161 Cal. Rptr. at 475, 604 P.2d at 1365.

57. Pennsylvania Human Relations Act, Act of Oct. 27, 1955, Pub. L. No. 744, *as amended*, PA. STAT. ANN. tit. 43, §§ 951-963 (Purdon 1964 & Supp. 1979).

58. *See* 1955 LEGISLATIVE JOURNAL—HOUSE at 429-48; 1955 LEGISLATIVE JOURNAL—SENATE at 2653-66, 2821-28.

employ" an individual; [59] or to "[d]eny or limit, through a quota system, employment . . . because of race . . . ." [60] In addition, the Act established the Pennsylvania Human Relations Commission and gave it authority to order a variety of affirmative relief, including anything which, in the Commission's judgment, "[would] effectuate the purposes of this act . . . ." [61] The Pennsylvania Supreme Court has interpreted the Act to permit Human Relations Commission orders requiring remedial racial quotas in response to racially discriminatory practices,[62] and to prohibit actions which have an unjustifiable racially disproportionate impact.[63]

The Second Class Cities Firemen's Civil Service Act (Civil Service Act) [64] was enacted by the Pennsylvania legislature to prohibit political patronage hiring and promotion in public employment,[65] particularly in the Pittsburgh Bureau of Fire,[66] by requiring that appointments and promotions be made on the basis of merit "from the top of the competitive list." [67]

Against this background, the Pennsylvania Supreme Court began its analysis in *Chmill* by considering the question of whether the Commission's certification plan violated Title VII.[68] While noting that the Supreme Court in *Weber* did not "detail the 'line of demarcation between permissible and impermissible affirmative action plans,' " [69] the majority looked for guidance to the *Weber* court's consideration of the plan's purpose,[70] its effect on the interests of non-minority employees,[71]

59. PA. STAT. ANN. tit. 43, § 955(a) (Purdon 1964 & Supp. 1979).

60. *Id.* § 955(b)(3).

61. *Id.* § 959.

62. Pennsylvania Human Relations Comm'n v. Chester Housing Auth., 458 Pa. 67, 327 A.2d 335 (1974), *cert. denied,* 420 U.S. 974 (1975); Balsbaugh v. Rowland, 447 Pa. 423, 290 A.2d 85 (1972).

63. General Electric Corp. v. Pennsylvania Human Relations Comm'n, 469 Pa. 292, 365 A.2d 649 (1976); Pennsylvania Human Relations Comm'n v. Chester Housing Auth., 458 Pa. 67, 327 A.2d 335 (1974), *cert. denied,* 420 U.S. 974 (1975).

64. PA. STAT. ANN. tit. 53, § 23493.1 (Purdon 1957 & Supp. 1979). *See* note 6 *supra.*

65. *See* 1963 LEGISLATIVE JOURNAL—SENATE at 679.

66. *See id.* (remarks of Sen. Fleming).

67. PA. STAT. ANN. tit. 53, § 23493.1(a) (Purdon 1957 & Supp. 1979). *See* note 6 *supra.*

68. 488 Pa. at 479-90, 412 A.2d at 865-71. The court noted that the appellees did not challenge the validity of the *Glickman* court's findings of discrimination. *Id.* at 481, 412 A.2d at 866. *See* 370 F. Supp. at 729-34.

69. 488 Pa. at 484, 412 A.2d at 868, *quoting* United Steelworkers v. Weber, 443 U.S. at 208.

70. 488 Pa. at 484, 412 A.2d at 868. *See* note 40 and accompanying text *supra.*

71. 488 Pa. at 484, 412 A.2d at 868. *See* note 41 and accompanying text *supra.*

and its duration.[72] Observing that the *Chmill* plan was developed in good faith,[73] was not overly broad,[74] and was a temporary means of correcting substantial racial disparity,[75] the majority concluded that the Commission's plan satisfied the *Weber* standards.[76]

Furthermore, the court refused to distinguish between the requirements of Title VII as applied to a private employment in *Weber* and public employment in the case before it.[77] The court asserted that this reading of Title VII is consistent with the evident intent of Congress, which expanded Title VII coverage to public employment for the "very purpose of providing state employees with the same protection afforded those already under the Act." [78] The court next rejected the view that Title VII prohibits the Commission from adopting an affirmative action

72. 488 Pa. at 484, 412 A.2d at 868. *See* note 42 and accompanying text *supra.*

73. 488 Pa. at 485, 412 A.2d at 868. The majority pointed out that there is no dispute that the Commission's action was taken in good faith to correct a history of substantial intentional discrimination in the Bureau of Fire. *Id.* The majority noted that the Commission's plan was intended to fulfill "the central statutory purposes of eradicating discrimination . . . and making persons whole for injuries suffered through past discrimination." *Id., quoting* Franks v. Bowmans Transp. Co., 424 U.S. 747, 771 (1976).

74. 488 Pa. at 485-86, 412 A.2d at 868-69. The majority pointed out that, like the plan in *Weber,* the Commission's action does not "eliminate all whites from job competition and does not deny to any person a job previously promised." *Id.* at 486, 412 A.2d at 869, *quoting* United Steelworkers v. Weber, 443 U.S. at 208.

75. 488 Pa. at 486, 412 A.2d at 869.

76. *Id.* at 485-86, 412 A.2d at 868-69.

77. *Id.* at 486-87, 412 A.2d at 869. The majority noted that two state supreme courts and a federal court of appeals presented with situations similar to *Chmill* had approved voluntary affirmative action plans by public employers. *Id.* at 486-87, 412 A.2d at 869, *citing* Detroit Police Officers Ass'n v. Young, 608 F.2d 671 (6th Cir. 1979), *petition for cert. filed,* 48 U.S.L.W. 3466 (Jan. 10, 1980) (No. 79-1980); Price v. Civil Serv. Comm'n., — Cal. 3d —, 604 P.2d 1365, 161 Cal. Rptr. 475 (1980); Maehren v. City of Seattle, — Wash. 2d —, 599 P.2d 1255 (1979), *petition for cert. filed,* 48 U.S.L.W. 3453 (Jan. 5, 1980) (No. 79-1061). For a discussion of the cases cited by the *Chmill* court, *see* notes 43-56 and accompanying text *supra.*

78. 488 Pa. at 487, 412 A.2d at 869. The majority stated, however, that "we need not decide this important federal issue here since we believe that the Commission's action is permissible even assuming a more stringent standard of justification than adopted in *Weber.*" *Id.* The court noted that, in this case, they were not limited to taking judicial notice of historic discrimination in the municipal fire department, but rather could rely on the previous federal judicial finding that the department had discriminated against minorities in its hiring programs. *Id.* at 487-88, 412 A.2d at 869-70. The majority noted that, in addition, they had the common pleas court's findings that the Commission's action at issue was taken as a necessary practical response to the federal judicial mandate to correct the racial discrimination. *Id.* at 488, 412 A.2d at 870. The majority concluded that "viewed in this light, . . . the justification for the Commission's action [was] compelling." *Id.*

plan voluntarily[79] and concluded by holding that the Commission was not precluded by Title VII from adopting its proposed plan.[80]

The court next addressed the issue of whether the Commission's plan violated the Pennsylvania Human Relations Act.[81] The majority noted that nothing in the legislative history of the Act suggested an intention to limit in any way the scope of possible remedial affirmative action [82] and also observed that an "absolute proscription on voluntary remedial affirmative action . . . is completely contrary to the statute's basic preference for voluntary compliance." [83] Thus, the court concluded that public employers who sought to remedy racial discrimination by affirmative action programs would not be prohibited from doing so by state law.[84]

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79. *Id.* at 488, 412 A.2d at 870. The majority stated that "such a prohibition on voluntary compliance with the Act [is] irreconciliable with the fundamentally conciliatory nature of the federal statute." *Id.* The court observed that "[c]ooperation and voluntary compliance were selected as the preferred means for achieving [the goals of Title VII]." *Id., quoting* Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974). The majority also observed that voluntary compliance is particularly appropriate in the area of public employment. 488 Pa. at 489, 412 A.2d at 870. The court asserted that "[i]n expanding Title VII's coverage to include public employment, Congress expressed natural concern over federal involvement in state and local employment matters." *Id.* The court stated: "[W]e do not readily believe that federal law requires states and state agencies to refrain from good faith compliance with federal employment standards only so that a federal court may order them to act." *Id.* at 490, 412 A.2d at 871. The court concluded that "we have no doubt that voluntary state compliance, where forthcoming, is inevitably superior to the often difficult practical problems of federal supervisory jurisdiction." *Id.*

80. 488 Pa. at 490, 412 A.2d at 871.

81. *Id.* at 491, 412 A.2d at 871. *See* notes 57-63 and accompanying text *supra.* The court stated that the Act should be construed in light of "principles of fair employment law which have emerged relative to the federal [statute] . . . ." 488 Pa. at 491, 412 A.2d at 871, *quoting* General Electric Corp. v. Pennsylvania Human Relations Comm'n, 469 Pa. 292, 303, 365 A.2d 649, 654 (1976). The majority stated that, while the independent status of the Pennsylvania statute should not be ignored or diminished, the facts of *Chmill* presented a particularly appropriate situation in which to harmonize the two statutes. 488 Pa. at 491, 412 A.2d at 871.

82. 488 Pa. at 492, 412 A.2d at 872. The majority observed that the legislative history of the Act makes evident that the pervading purpose of the legislation was to remedy discrimination against those historically subordinated. *Id.* The court stated that the statute's remedial nature is apparent in several of its provisions, including the legislature's express admonition that: "The provisions of this act shall be construed liberally for the accomplishment of the purposes thereof, and any law inconsistent with any provisions hereof shall not apply." 488 Pa. at 493, 412 A.2d at 872, *quoting* PA. STAT. ANN. tit. 43, § 962(a) (Purdon 1964).

83. 488 Pa. at 493, 412 A.2d at 873. The majority observed that the legislature charged the Human Relations Commission with the duty to attempt to obtain voluntary compliance by "conference, conciliation and persuasion" in cases where it believes discriminatory practices exist. *Id.* at 493, 412 A.2d at 872-73, *quoting* PA. STAT. ANN. tit. 43, § 959 (Purdon 1964).

84. 488 Pa. at 494-95, 412 A.2d at 873.

The question of whether the Commission's action violated the Second Class Cities Firemen's Civil Service Act [85] requirements for the appointment of firefighters was subsequently confronted by the court.[86] The majority rejected the plaintiff's argument that the Commission's decision to certify from two lists was inconsistent with the express language of the statute.[87] The court stated that the Commission's action did not conflict with the statutory requirement of merit selection,[88] noting that "uncontradicted substantial evidence" [89] supported the trial court's finding that all of the candidates who passed the Commission's 1975 test were equally qualified for jobs as firefighters.[90] The court accordingly held that the civil service statute did not bar the Commission's action.[91]

Finally the court turned to the question of whether the equal protection clause of the fourteenth amendment prohibits a public employer, found guilty of prior racial discrimination, from voluntarily adopting racial hiring preferences as appropriate remedial action.[92] The majority stated that "although *Bakke* . . . provides us with no single opinion of the Court concerning the constitutional limitations on affirmative action, we believe that the Commission's plan in this case satisfies the constitutional standards of all five Justices who considered the question." [93]

85. *See* notes 64-67 and accompanying text *supra.*

86. 488 Pa. at 495-98, 412 A.2d at 873-75.

87. *Id.* at 496, 412 A.2d at 874.

88. *Id.*

89. *Id.*

90. *Id.* The court observed that the Commission's Chief Examiner, testifying before the court of common pleas, stated that a score of higher than the passing score of 75 was not evidence of greater qualification. *Id.* The court noted that this testimony was reflected in the trial court's unchallenged finding that "the minority applicants who would be given preference are as qualified for the position of firefighter as those who scored higher on the examination." *Id.* at 497, 412 A.2d at 875. Because of this finding, the majority considered it unnecessary to decide whether the Commission might have had discretion to certify minority applicants less qualified than the appellees. *Id.* at 497-98, 412 A.2d at 875. The court noted, however, that the section on which the appellees relied expressly permitted the Commission to refuse to hire from the "top of the . . . list" for "just cause in writing." *Id., quoting* PA. STAT. ANN. tit. 53, § 23493.1(a) (Purdon 1957). The court opined "that in some circumstances remedial compliance with some other state and federal employment standards would be sufficient to meet this just cause requirement." 488 Pa. at 498, 412 A.2d at 875.

91. 488 Pa. at 498, 412 A.2d at 875.

92. *Id.* at 498-504, 412 A.2d at 875-78. *See* note 22 *supra.* The court noted that their "touchstone" was the *Bakke* decision. 488 Pa. at 499, 412 A.2d at 875.

93. 488 Pa. at 500, 412 A.2d at 876. The majority noted that they were satisfied that their view was consistent with what Justice Brennan described as "the central meaning" of the opinions in *Bakke* when they are read together, and quoted from Justice Brennan's opinion: "Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages case [*sic*] on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative

The majority noted that the plan would be acceptable to Justices Blackmun, Brennan, Marshall and White because it served important governmental objectives,[94] was "substantially related to the achievement of those objectives," [95] and did not stigmatize any group or "single out those least well represented in the political process to bear the brunt of a benign program." [96] The court next concluded that, because there was a predicate of judicially determined discrimination, the plan satisfied the standards articulated by Justice Powell in *Bakke*.[97]

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bodies with competence to act in this area." *Id., quoting* Regents of the Univ. of Cal. v. Bakke, 438 U.S. at 325 (Brennan, J., concurring in part and dissenting in part).

94. 488 Pa. at 500-01, 412 A.2d at 876. The majority observed that the Brennan group left no doubt that providing a remedy for past racial discrimination was an important governmental objective. *Id.* at 501, 412 A.2d at 876. The court noted that these justices had found the University of California's purpose of remedying the effects on medical school admissions of past societal discrimination to be a suitable goal, and observed that they expressly declared that remedial measures taken in response to a judicial finding of prior discrimination would be *a fortiori* acceptable. *Id. See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. at 366 & n.42.

95. 488 Pa. at 500-01, 412 A.2d at 876. The majority noted that the Commission's plan was appropriately related to its remedial goal. *Id.* The court observed that there was substantial evidence in the record to indicate that the Commission's action in the case was a necessary practical step toward achieving adequate minority representation in the Bureau of Fire. *Id.* The majority also noted that the trial court found that "no other alternative than a preferential hiring quota [would] relieve the situation." *Id.* The court went on to note that "the City's request to certify candidates for twenty new positions in the Bureau presented the Commission with an unusual opportunity to remedy a racial imbalance which had persisted despite substantial efforts at minority recruitment." *Id.* at 501, 412 A.2d at 876-77. The majority also pointed out that the Commission's proposal did not interfere with any existing employment rights. *Id.* at 501, 412 A.2d at 877.

96. *Id.* at 501, 412 A.2d at 877. The *Chmill* court noted that, as with the Davis Medical School admissions program in *Bakke,* neither blacks nor whites were stigmatized or singled out to bear the burden of the Commission's plan. *Id.* The court observed that the minority applicants affected by the program voluntarily intervened as defendants in the trial court urging support of the Commission's action. *Id.* The court also noted that the white applicants were not forced to bear an inappropriate burden and observed that nothing in the record suggested that the appellees were any more qualified than the minority applicants the Commission wished to certify. *Id.* The court further observed that 50% of those to be certified were white, and that under the applicable state civil service law the appellees would have remained on the eligibility list. *Id.* The majority pointed out that, under usual practices, appellees would have been certified at a later date and concluded that any potential harm to the appellees "simply does not outweigh the necessity for the effective remedial action taken by the Commission." *Id.*

97. *Id.* The majority noted that, in Justice Powell's view, racial classifications are always suspect and should accordingly be subjected to strict scrutiny. *Id.* The court observed that as Justice Powell described this approach, a state's use of even a remedial classification would be permissible only if "its purpose or interest is both constitutionally permissible and substantial, and . . . its use of the classification is 'necessary . . . to the accomplishment' of its purpose or to the safeguarding of its interest." *Id., quoting* Regents of the Univ. of Cal. v. Bakke, 438 U.S. at 305. The court noted, however, that like Justice Brennan and those who joined him, Justice Powell acknowledged that the objective of

Lastly, the court approached the question of whether the specific remedial action adopted by the Commission was constitutionally valid.[98] The majority noted that Justice Powell's opinion "strongly suggested" that explicit racial preferences would be acceptable if they were in response to "judicial, legislative, or administrative findings of constitutional or statutory violations." [99] The *Chmill* majority stated that they considered the district court's previous findings of discrimination in *Commonwealth v. Glickman* to be sufficient to meet the threshold requirement articulated by Justice Powell [100] and thus concluded that the Commission's remedial plan was not prohibited by the equal protection clause.[101]

In a dissenting opinion, Justice Larsen observed that the Firemen's Civil Service Act expressly required appointment to the fire department to be made from the top of a competitive list.[102] Justice Larsen further noted that the purpose of the Act was to eliminate discrimination by establishing certification from the top down as a mechanical procedure.[103] In Justice Larsen's view, the majority's approval of the program at issue "would destroy this noble goal by . . . giving to the employing agency

remedying past discrimination was substantial. 488 Pa. at 502, 412 A.2d at 877. The court further observed that Justice Powell "strongly stated" that, given the predicate of judicially determined discrimination, remedial race-conscious action should be permissible. *Id.*

98. 488 Pa. at 503, 412 A.2d at 877.

99. *Id., quoting* Regents of the Univ. of Cal. v. Bakke, 438 U.S. at 307. The majority also noted that Justice Powell's opinion in *Bakke* had been similarly interpreted by the California Supreme Court in Price v. Civil Serv. Comm'n, — Cal. 3d —, 161 Cal. Rptr. 475, 604 P.2d 1365 (1980), and by a number of legal scholars. 488 Pa. at 503, 412 A.2d at 877. The majority noted that, in disapproving the University of California's self-initiated admissions program, Justice Powell specifically distinguished the Court's employment discrimination cases and the decisions of the federal courts of appeals which had required racial preferences as remedies for established violations of federal employment laws. *Id.* at 503, 412 A.2d at 878. The court next observed that Justice Powell did not suggest that courts are the only governmental bodies which may take action to remedy discrimination once an appropriate determination of prior discrimination has been made. *Id.*

100. 488 Pa. at 504, 412 A.2d at 878.

101. *Id.*

102. *Id.* at 508, 412 A.2d at 880 (Larsen, J., dissenting). Justice Larsen considered the "overriding question" to be whether the court should permit "a Commission established by the legislature to 'enact' rules contrary to those established by the legislature." *Id.* at 506, 412 A.2d at 879 (Larsen, J., dissenting). Justice Larsen asserted that, if the Commission felt the quota system was needed in order to remedy past discrimination, it should have sought a judicial determination, based upon a record developed in open court, of whether the quota system was necessary to correct past discriminatory behavior. *Id.* Justice Larsen also noted that, in the alternative, the Commission could have sought amendments to the law to permit two certified lists of candidates. *Id.*

103. *Id.* at 506, 412 A.2d at 879 (Larsen, J., dissenting).

the right to pick and choose who would be certified." [104] Justice Larsen considered *Weber* irrelevant because the governmental agency involved in *Chmill* was without authority to establish a quota system unilaterally.[105]

On reviewing the court's opinion in *Chmill,* it is submitted that the court correctly decided that the *Weber* decision could be extended to cover public employees.[106] The United States Supreme Court has specifically recognized that the legislative history of the 1972 amendment extending Title VII to public employees evidenced an intent that "the same Title VII principles be applied to government and private employers alike." [107] Furthermore, every court of appeals that has passed on the issue has concluded that the requirements of Title VII apply with equal force to both private and public employers.[108]

It is further submitted that, by applying the *Weber* standards to the plan in *Chmill,* the court properly tested the plan.[109] The court's analysis of the plan's purpose, its effect on non-minorities, and its duration was appropriate in light of the Supreme Court's decision in *Weber* and is consistent with other courts' reading of that case.[110] Moreover, the court's harmonizing of the Pennsylvania Human Relations Act with Title VII is likewise appropriate in light of the legislative history of the Act [111] and consistent with other state court interpretations of similar state anti-discrimination statutes.[112]

Additionally, the analysis used by the court to conclude that the plan in *Chmill* satisfies the equal protection criteria established by Justice Powell in *Bakke* appears to be sound.[113] The predicate of judi-

104. *Id.* at 508, 412 A.2d at 880 (Larsen, J., dissenting). Justice Larsen noted that the trial court had found that the Civil Service Commission "violated the express terms of the Civil Service Act . . . ." *Id.*

105. *Id.*

106. *See* notes 107-08 and accompanying text *infra.*

107. Dothard v. Rawlinson, 433 U.S. 321, 332 n.14 (1977). *See* note 29 *supra.*

108. *See* note 29 *supra* and authorities cited therein.

109. *See* 488 Pa. at 479-90, 412 A.2d at 865-71.

110. *Cf.* Price v. Civil Serv. Comm'n, — Cal. 3d at —, 161 Cal. Rptr. at 483-88, 604 P.2d at 1376 (*Weber* construed to require an examination of an affirmative action plan's purpose, its effect on non-minorities, and its duration, to determine whether the plan violates Title VII). *See* notes 68-76 and accompanying text *supra.*

111. *See* note 58 and accompanying text *supra.*

112. *Cf.* Price v. Civil Serv. Comm'n, — Cal. 3d at —, 161 Cal. Rptr. at 487, 604 P.2d at 1376 (the anti-discrimination provisions of the California Fair Employment Practice Act construed by the California Supreme Court as consistent with Title VII).

113. *See* notes 97-101 and accompanying text *supra.*

cially determined discrimination is clearly sufficient to permit a race-conscious affirmative action plan in Justice Powell's view,[114] and the Pennsylvania Supreme Court's conclusion that such a judicial determination would be sufficient to permit *explicit* racial preferences appears to be the correct interpretation of Justice Powell's opinion.[115]

Finally, it is submitted that the court has failed to address adequately the contention that the Firemen's Civil Service Act prohibits the affirmative action plan at issue.[116] While it may be true, as the court notes, that a higher score on the examination does not signify greater potential job competency,[117] the Civil Service Act envisions hiring applicants with higher test scores first.[118] Any deviation from this practice must be "for just cause in writing." [119] The majority implies that the Commission's efforts to remedy past discrimination would fall within this "just cause" exception.[120] It is submitted, however, that their failure to hold so explicitly undermines the procedures required by the Civil Service Act to ensure fairness in hiring.[121] In view of the fact that the Civil Service Act represents a considered attempt by the Legislature to remedy another specific societal ill, it is suggested that the Act's provisions are entitled, at the very least, to the application of a more considered analysis which seeks to balance the goals of the Act with those of the affirmative action program. The court's more summary analysis, however, fails to provide the Legislature, the lower courts, and prospective litigants with workable guidelines on how best to accommodate the twin goals of merit hiring and affirmative action. Consequently, it is submitted that the long range impact of *Chmill* may well be to engender further litigation whenever these two goals come into conflict.

On the facts of this case, however, the Pennsylvania Supreme Court has joined the ranks of those courts which have sought to fashion a coherent, sensitive, and realistic social policy out of the often bewildering problem of affirmative action and reverse discrimination.[122] These courts have striven in their decisions to encourage progressive social policy while minimizing social friction. It would be difficult to envision

114. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. at 307 (opinion of Powell, J.).

115. *Id.*

116. *See* notes 85-91 and accompanying text *supra.*

117. *See* notes 88-90 and accompanying text *supra.*

118. *See* notes 6, 102-04 and accompanying text *supra.*

119. *See* note 6 *supra.*

120. 488 Pa. at 498, 412 A.2d at 879.

121. *See* notes 102-04 and accompanying text *supra.*

122. *See* notes 43-56 and accompanying text *supra.*

the United States Supreme Court adopting a position far afield from the Pennsylvania Supreme Court's decision in this case.[123]

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123. Two cases on point with *Chmill* are subjects of petitions for certiorari to the Supreme Court: Detroit Police Officers' Ass'n v. Young, 608 F.2d 671 (6th Cir. 1979), *petition for cert. filed,* 48 U.S.L.W. 3466 (Jan. 10, 1980) (No. 79-1080); Maehren v. City of Seattle, — Wash. 2d —, 599 P.2d 1255 (1979), *petition for cert. filed,* 48 U.S.L.W. 3453 (Jan. 5, 1980) (No. 79-1061).

Additionally, the Court has recently heard oral argument on a prison guard's challenge to an affirmative action plan implemented by the California Department of Corrections. Minnick v. California Dept. of Corrections, 95 Cal. App. 3d 506, 157 Cal. Rptr. 260 (1979). The plan in *Minnick,* adopted by the Department of Corrections without a predicate of judicially determined discrimination, sought to increase the number of female employees in the department to a level equalling their percentage in the California labor force and to increase the number of minority employees generally to a number equalling at least 70% of any given minority in the prison population. *Id.* at 513-14, 157 Cal. Rptr. at 264. A California state trial court declared the plan unconstitutional, but the California Court of Appeals held the plan permissible by *Bakke* standards. *Id.* at 517-26, 157 Cal. Rptr. at 266-72. The California Supreme Court refused to review the ruling. *See* 49 U.S.L.W. 3417 (Dec. 2, 1980). The reports of the oral argument before the United States Supreme Court, however, appear to indicate that the Court may be inclined to dispose of the case on procedural grounds. *See id.* at 3417-19 (observing that the majority of the questions from the Bench in *Minnick* were focused on the plaintiff's standing).